

Special Elections to Fill Vacancies on the International Court of Justice

By [Natalya Scimeca](#)

Introduction



The past several months have given rise to a number of high-level judicial resignations. While the media has been saturated with commentary regarding the retirement of Justice John Paul Stevens from the United States Supreme Court, of equally profound interest to international legal observers is the retirement of two judges from the International Court of Justice in The Hague, the Netherlands (“the ICJ” or “the Court”) – Judge Thomas Buergenthal of the United States and Judge Shi Jiuyong of

China.

Judge Buergenthal was first elected to the Court in a special election following the retirement of Judge Stephen Schwebel in 2000, and was subsequently elected to a nine-year term that will expire in 2015.^[1] Judge Shi was elected to the Court in 1994, serving as President of the Court from 2003 until 2006. His term will expire in 2012.

Since Judge Buergenthal and Judge Shi will retire from the Court prior to the end of their terms, the United Nations General Assembly and Security Council will elect two judges to serve the remainder of their terms in special elections that will take place later this year,^[2] as required by the Statute of the International Court of Justice (“the ICJ Statute”).^[3] This *Insight* examines the statutory requirements and traditional practices that apply in special elections for ICJ judges.

Qualifications for ICJ Judges

ICJ Judges must be elected “from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”^[4] Georges Abi-Saab neatly highlighted the

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distinction between these two career paths, explaining that those considered jurisconsults are scholars or professors with an expertise in international law, whereas those qualified for “the highest judicial offices” are most often law practitioners or judges who are highly knowledgeable in judicial techniques, but who perhaps lack in-depth exposure to international law.^[5] In the past, ICJ judges have been drawn predominantly from the ranks of law professors and those from a third career path – diplomats.

Article 9 of the ICJ Statute requires that judges collectively represent the main forms of civilization and the principal legal systems of the world. According to longstanding tradition, and with one notable exception, a national of each of the five permanent members of the Security Council (“the P5”) serves on the ICJ at all times. The remaining ten judges reflect a system of geographical distribution that incidentally mirrors the membership of the Security Council.^[6] The exception to this unwritten rule occurred between 1967 and 1985, when China was not represented on the Court.^[7] No two judges may possess the same nationality.^[8] Thus, as the sitting U.S. national and Chinese national, respectively – both nationals of P5 nations – Judge Buergenthal and Judge Shi will almost certainly be replaced by individuals holding those same nationalities.

National Groups and the Nominating Process

Pursuant to the ICJ Statute, within one month of the occurrence of a vacancy on the Court, the Secretary-General must invite nominations for a successor and the Security Council must fix the date of the election, which may take place no sooner than three months later.^[9] Thereafter, the same rules and procedures govern regular and special elections.^[10]

Candidates for seats on the Court are nominated not by national governments but by “national groups” at the Permanent Court of Arbitration (“PCA”), also situated in The Hague, or in the case of U.N. Member States that are not represented at the PCA, by specially constituted national groups. Thus, nominations are one step removed from the control of national governments. That said, a national group consists of four individuals who have been nominated to the PCA by their government.^[11]

Each national group is entitled to submit a list of up to four people, no more than two of whom may be of the same nationality as the national group itself.^[12] The ability to nominate jurists of other nationalities has been regarded as a strength in the nominating process, as it fosters an open environment in which candidates, their advocates, and other interested parties have an interest in conferring with each other about the proposed nominees, which ultimately benefits the transparency of the election process.^[13] In selecting nominees, each national group is encouraged to consult its highest court of justice, its legal faculties and law schools, and its national academies and sections of international academies devoted to the study of law.^[14]

By way of example, the U.S. national group consists of four members, traditionally made up of the serving U.S. State Department Legal Advisor (currently Harold Koh), the previous Legal Advisor, and other prominent jurists, often previous Legal Advisors. It is bi-partisan in nature, including

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both Republicans and Democrats. Evidence suggests that the U.S. national group has remained fairly independent from the U.S. government, and there has been at least one case in which it has supported a different candidate than that preferred by the administration.^[15] In accordance with the recommendations contained in the ICJ Statute, the U.S. national group consults with professional bodies, including, among others, the American Society of International Law, the American Bar Association, and the American Branch of the International Law Association, in making its recommendations. It also engages in informal consultations with persons of expertise in international judicial and arbitral institutions.^[16]

The extent to which other national groups are beholden to their governments appears to vary, and case studies are limited.^[17] Little is known about the inner workings of the national groups, including the methods they use to identify and select nominees and in particular the independence they exercise from their governments.

Although national governments have no power to nominate individuals, evidence suggests that they do make their preferences known during the nomination process, such as by soliciting other national groups to nominate one of their nationals.^[18] A government's willingness to campaign for the widespread nomination of a candidate of its nationality can be crucial in an election in which multiple candidates from the same region compete for one seat on the Court (i.e., elections for judges who are not nationals of the P5). The number of nominations received for any candidate is perceived as an early indication of the support behind the candidate, even though only one nomination is required for a prospective judge to appear on the ballot.^[19] Candidates for ICJ judgeships are also active during the nominating process, and they have been known to openly campaign.^[20]

Election in the Security Council and General Assembly

From among the nominated candidates, the U.N. Security Council and General Assembly vote simultaneously but separately until an absolute majority in each body has selected the same candidate.^[21] In a regular election for five judges this may require multiple rounds of voting as the pool narrows. Because the election is held among the U.N. political organs, power politics and regional alliances come into play; therefore, the candidate's ability to obtain the active support of his or her own government is crucial.^[22]

But in a special election for one judge, the process should arguably be more streamlined. A former member of the U.S. national group has noted that in recent special elections, the General Assembly and Security Council have favored the nomination of the national group of the state of the departing judge.^[23] Moreover, in an election to replace a national of the P5, an understanding will exist that a judge of one specific nationality will be elected. In this case, while it is theoretically possible that the national groups will nominate more than one American or Chinese leading to a contest between two or more candidates, this would be an unprecedented turn of events.

Conclusion

Given historical precedent, we can expect that a sole American judge will be nominated to fill Judge Buergenthal's seat, a sole Chinese national will be nominated to fill Judge Shi's seat, and both of these candidates will subsequently be elected to the Court. By the end of the year there will be two new faces on the International Court of Justice, and if these judges are later elected in their own right, they may serve many years on the Court.

While great efforts are taken to ensure that representation on the Court is geographically equitable, the Court remains grossly unrepresentative with respect to gender. Of the nearly 100 judges who have served on the Court since its inception, only one has been a woman. Judge Rosalyn Higgins of the United Kingdom retired from the Court upon the expiration of her second term in 2009. Thus, if a woman is not elected to replace Judge Buergenthal or Judge Shi, the Court will remain an all-male institution.^[24] This would be unfortunate at a time when the Court's supporters seek to justify its continuing relevance and its unique status within the international legal realm.^[25]

About the Author

Natalya Scimeca served as the law clerk for Judge Thomas Buergenthal during the 2004-2005 term of the International Court of Justice.

Endnotes

[1] Every three years, a regular election takes place in which five judges, representing one-third of the Court, are elected to nine-year terms of office.

[2] See Press Release, Security Council, Security Council Sets 29 June as Date to Fill International Court of Justice Post, U.N. Press Release SC/9883 (Mar. 18, 2010), *available at* <http://www.un.org/News/Press/docs/2010/sc9883.doc.htm> (announcing a special election to fill the vacancy created by the resignation of Judge Shi); Press Release, Security Council, Security Council Sets 9 September as Date for Election, U.N. Press Release SC/9941 (June 2, 2010), *available at* <http://www.un.org/News/Press/docs/2010/sc9941.doc.htm> (declaring a special election to fill the vacancy created by the resignation of Judge Buergenthal).

[3] See Statute of the International Court of Justice art. 15 [hereinafter ICJ Statute], *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (providing that “[a] member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor’s term”).

[4] *Id.* art. 2.

[5] See Georges Abi-Saab, *Ensuring the Best Bench: Ways of Selecting Judges*, in *INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE* 168 (Connie Peck & Roy S. Lee eds., 1997).

[6] See Kenneth J. Keith, *International Court of Justice: Reflections on the Electoral Process*, 9 *CHINESE J. INT'L L.* 49, ¶ 4 (2010).

[7] See *id.* ¶¶ 4, 9.

[8] See ICJ Statute art. 3(1).

[9] See *id.* arts. 5, 14.

[10] See *id.* art. 14.

[11] See Davis R. Robinson, *The Role of Politics in the Election and the Work of Judges of the International Court of Justice*, 97 AM. SOC'Y INT'L L. PROC. 277, 279 (2003).

[12] See ICJ Statute art. 4.

[13] See Keith, *supra* note 6, ¶ 17.

[14] See ICJ Statute art. 6.

[15] See Robinson, *supra* note 11, at 279.

[16] See Lori Damrosch, *The Election of Thomas Buergenthal to the International Court of Justice*, 94 Am. J. Int'l L. 579, 581 (2000).

[17] See generally Keith, *supra* note 6, ¶¶ 9-15; Robinson, *supra* note 11, at 279.

[18] See Robinson, *supra* note 11, at 279.

[19] See Keith, *supra* note 6, ¶ 7.

[20] See *id.* ¶ 17, n.28.

[21] ICJ Statute arts. 8, 10.

[22] See Keith, *supra* note 6, ¶ 20.

[23] See Damrosch, *supra* note 16, at 580.

[24] Similarly, the Court has never had a female Registrar, its chief administrative officer. The first female Deputy-Registrar, Thérèse de Saint Phalle, was elected in 2007.

[25] This outcome may be avoided, as the Chinese national group has apparently nominated Madam Xue Hanqin, who is currently the Chinese Ambassador to the Association of Southeast Asian Nations (ASEAN) and a member of the International Law Commission.